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Supreme Court of the United States

OCTOBER TERM, 1959

No. 339

NEW HAMPSHIRE FIRE INSURANCE CO.,

Petitioner,

vs.

**SCANLON, DISTRICT DIRECTOR OF INTERNAL
REVENUE, ET AL.,**

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR PETITIONER

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The Erroneous Assumptions in Respondent's Brief

It is respectfully submitted that Respondent's brief makes a series of erroneous assumptions and begs the questions presented.

This is not an action against the United States and not an action against a "collector" or a "revenue official". This is an application to the court to order the return from its custody of property allegedly "taken or detained" by an individual tortfeasor who happens to be a revenue official and purports to have acted under a "revenue law".

If Respondent was, in fact, acting within the scope of his authority as a revenue official in detaining Petitioner's property, we would concede that this proceeding could not be sustained. On the other hand, if Respondent admittedly acting "administratively" and without judicial sanction

(Resp. Br. p. 8) has seized or detained the property of a non-taxpayer, then he is plainly a mere individual tortfeasor and in the absence of Section 2463, no basis for federal jurisdiction suggests itself. If this were an action against Respondent there would be no diversity of citizenship and the action would not appear to "arise under" any federal law. *Maule Industries v. Tomlinson*, 244 F. 2d 897 (5th Cir. 1957); *Johnston v. Earle*, 245 F. 2d 793 (9th Cir. 1957).

What, then is the basis of federal jurisdiction? The answer would appear to be the power of a court to exercise control over property placed in its custody. Section 2463 gives custody to the federal courts of property seized under the alleged authority of the revenue laws where the owner alleges that the property was not in fact seized under those laws.

In express language not the alleged "collector" but the detained property is made subject to the orders and decrees of the federal courts. Congress, in enacting Section 2463, clearly sought to strike a balance between the power to enforce the revenue laws by extra-judicial seizures and the right of an owner to recover property seized, without authority, by one claiming to be acting under the revenue laws.* And, in substance, the remedy given to the aggrieved non-taxpayer was to petition the federal court "having jurisdiction thereof" to order the return of his property

*Despite respondent's contention to the contrary (Resp. Br. p. 14, fn. 9), it seems clear that Congress, when it enacted the forerunner of Section 2463, was in a "compromising mood". IX Gale and Seaton, Register of Debates, in Congress, 244 *et seq.* (1833) is replete with references which indicate the Congressional desire to minimize South Carolina's contentions that the bill represented a form of tyranny.

E.g., Senator Wilkins, who reported the bill from the Committee on the Judiciary:

"* * * [T]he bill was made general and sweeping, in its terms and application, for the reason that this course was thought to be more delicate in regard to the State concerned." (p. 247)
 "The object of this section [the section containing what is now

from its custody. The court "having jurisdiction" is thus naturally the court for the district in which the property is located. *Raffack v. Grange*, 196 F. 2d 620, 623 (3d Cir. 1952) and cases there cited. Plainly, jurisdiction does not lie in the district in which the alleged tortfeasor might be found since there is not an action against the tortfeasor but merely an application to the court as the custodian of the property for its return.

The Case of IN RE FASSETT

We are at a loss to understand Respondent's reliance on *In re Fassett*, 142 U. S. 479 (Resp. Br. pp. 21-23). This case seems to us to be precisely contrary to the proposition for which it is cited by Respondent, viz, that Section 2463 protects the "collector's custody" rather than the "custody [of] the courts". In *Fassett*, after the vessel had been seized by the collector for the enforcement of the payment of duties upon her, the owner filed a libel in the District Court and in due course the marshal took possession of the vessel, thus taking it away from the "collector's custody". Part of the relief sought by the collector in the District Court was "restitution of the vessel to the collector" (*Fassett* p. 483).

The collector then moved in this Court for a writ of Prohibition to the District Judge to prohibit him from proceeding with the libel. The writ was denied, thus confirming the removal of the vessel from the custody of the collector.

The collector contended that when, as collector, he took possession of the yacht and decided that she was dutiable,

§2463] is to meet legislation by legislation. There is nothing in this provision shocking or harsh." (p. 259)

Since Congress clearly did not desire to punish South Carolina or increase state-federal friction, it seems reasonable to conclude that Congress wished to provide in the federal courts relief as expeditious as was available in state courts.

the only remedy open to her owner was to pay under protest the duties assessed upon her, and for that was secure possession of her, with the right thereafter to sue for a refund of the duties. This contention was, of course, rejected by this Court which pointed out that "The libel presents for the determination of the district court, as the subject matter of the suit, the question whether the yacht is an imported article, within the meaning of the customs revenue laws". (Fassett p. 483).

The quotation from Fassett reproduced in Respondent's Brief, p. 21, allegedly to show that "This Court** accepted the premise that "custody of the law" means "protecting the collector's custody rather than giving custody to the courts", does not, we submit do any such thing. On the contrary, we believe the quotation confirms that the "custody" involved is the custody of the courts. The quotation is as follows:

"* * * while it [the vessel] was so in the custody of the law that it must continue to be detained by the collector, subject only to the orders and decrees of the courts of the United States having jurisdiction thereof, it was subject to such orders and decrees."

Patently the "custody of the courts" in virtually every case where provision therefor is made would be constructive rather than actual. Pending the determination of the merits, the physical property involved must be kept somewhere, but as the quotation affirms, it is the property, rather than any particular person that is "subject to the orders and decrees of the court".

A single illustration, we believe, will show the fatal weakness of a contention that it is the "collector's custody" that is to be "protected". Suppose the collector were concededly a dishonest person and, having with felonious intent, seized a non-taxpayer's negotiable securities, resisted the removal of the property from his possession on the ground he was a "collector" and was protected in posses-

sion until a "plenary civil suit" should be instituted against him and duly tried. Could there be any doubt that the court having custody would have the power summarily to order the property to be transferred to safer custody?

In the ordinary case, of course, the honesty of the collector is not doubted and, therefore, there is no objection to his retaining physical custody. We submit, however, that the constructive custody is at all times in the court whether the actual custody is in the collector or somewhere else.

Irrelevance of Other "In Rem." Actions

Finally, we believe that it is of no significance that in certain *in rem* or *quasi in rem* actions the plaintiff is not entitled to seek the return of his property by means of a summary proceeding. (Resp. Br. p. 24). Where specific procedures have been prescribed for the determination of the issues raised, in particular actions such procedures would naturally control. In the instant case, no specific procedure is defined by the statute. And, for the reasons above stated, we submit it was the unmistakable intention of Congress that an aggrieved petitioner complaining that his property had been seized without statutory warrant and without judicial sanction by an alleged "collector", should not be required to abide by the time requirements applicable to the general run of cases, but should have the right to come directly before the court in whose custody the property has been placed and to have it returned to him at the earliest possible time consistent with due process.

Respectfully submitted,

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